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No. 86-67

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

THE RATH PACKING COMPANY CREDITORS' TRUST,
SUCCESSOR IN INTEREST TO THE RATH PACKING COMPANY,
PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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14 pp

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that petitioner's subjective hiring practices violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, because of their adverse impact on females?

2. Whether the court of appeals erred in holding that petitioner's policy against hiring spouses of existing employees was not justified by business necessity?

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 787 F.2d 318. The opinion of the district court (Pet. App. 1d-36d) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1986. On June 17, 1986, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including July 17, 1986. The petition for a writ of certiorari was filed on July 17, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. From at least 1971 to June 1978, petitioner operated a hog slaughtering and processing facility in Columbus Junction, Iowa. Petitioner employed approximately 250 persons in the Columbus Junction facility, about 95% of whom employees were male. In September 1977, the Equal Employment Opportunity Commission filed this action, alleging that the composition of petitioner's workforce was attributable to employment practices violative of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Specifically, the Commission alleged that petitioner's subjective hiring practices and policy against hiring spouses of existing employees unlawfully discriminated against females because of their sex. Pet. App. 3d.

2. The district court agreed with the Commission that petitioner's subjective hiring practices violated Title VII (Pet. App. 4d-23d). The court noted that petitioner had not used any objective criteria in selecting employees (*id.* at 4d-6d), that hiring decisions at the Columbus Junction facility had been the responsibility of one company official (*id.* at 4d-5d), that that official was "unable to identify what information he deem[ed] significant in evaluating applications * * * or to * * * indicate what factors prompt[ed] him to select some individuals * * * and to reject others" (*ibid*), and, most importantly, that statistically significant disparities—disparities sufficient to establish a prima facie case of adverse impact—existed between the percentage of females employed in the Columbus Junction facility and the percentages of actual and potential female applicants during the 1971-1978 period (*id.* at 6d-11d).[1] The court then

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[1]The court found that between 1973 and 1978 petitioner hired only seven females and that, based on applicant flow data, petitioner reasonably could have been expected to hire 29.34 females—a disparity of 4.96 standard deviations (Pet. App. 7d-8d, 33d-34d). The court also found that, in 1971, females comprised 5.69% of the Columbus Junction plant

found that the subjective hiring practices' adverse impact could not be defended as "job-related," noting that there was "no credible proof * * * that [petitioner] looked for certain qualifications in evaluating applicants * * *, nor was there any suggestion in the record that [petitioner] consistently sought the most qualified and experienced individuals * * *" (*id.* at 15d). Finally, the court determined that the Commission had successfully proven several specific instances of intentional discrimination (*id.* at 16d-23d). Accordingly, the court held that petitioner's subjective hiring practices were violative of Title VII (*id.* at 31d-32d).

However, the district court found that petitioner's "no-spouse" rule—*i.e.*, its policy against hiring spouses of existing employees—did not violate Title VII (Pet. App. 23d-31d). The court agreed with the Commission that the no-spouse rule had a disparate adverse impact on female applicants (*id.* at 23d-26d) and that petitioner had not "corroborate[d] its contention that production was adversely affected through the hiring of spouses * * *" (*id.* at 29d). But the court found that petitioner had promulgated the no-spouse rule to promote legitimate business concerns[2] and that such concerns were "reasonabl[y], albeit theoretica[lly]," addressed by the no-spouse rule (*id.* at 29d-31d).

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labor force and 21.58% of the relevant labor pool—a disparity of 5.845 standard deviations (*id.* at 7d-9d, 34d-35d). This Court has held that a disparity of 2 or 3 standard deviations can be legally significant. *Castaneda* v. *Partida*, 430 U.S. 482, 496-497 n.17 (1977).

[2]Petitioner suggested that four problems related to spousal employment—dual absenteeism, tensions engendered by spousal supervision, scheduling of vacations and leaves of absence, and employee pressure to hire spouses—led it to adopt the no-spouse rule. See Pet. App. 26d. The district court found that these problems either were corrected prior to the implemention of the no-spouse rule or were based on singular incidents. (*id.* at 26d-28d). Nevertheless, it agreed with petitioner that, as a general matter, spousal employment creates problems in employee morale. (*id.* at 29d).

Accordingly, the court held that petitioner had established that the no-spouse rule was justified by business necessity (and therefore did not violate Title VII) (*id.* at 30d-31d).[3]

3. On appeal by petitioner and on cross-appeal by the Commission, the Court of Appeals for the Eighth Circuit affirmed in part and reversed in part (Pet. App. 1a-44a). As to the subjective hiring practices, the court of appeals agreed with the district court that petitioner had not shown that these practices were "job-related": Petitioner had been "unable to identify the criteria and qualifications which were considered in the hiring decisions * * * [and] therefore [could] not establish that these qualifications were necessary to the safety and efficiency of its operations" (*id.* at 17a). However, as to the no-spouse rule, the Commission argued and the court of appeals agreed that the district court had imposed a lighter burden on petitioner than required by law and that the district court's finding of business necessity was contrary to the record evidence and inconsistent with its own subsidiary findings (*id.* at 24a). The court of appeals' disagreement with the district court went to that court's failure to "consider whether there was a compelling need for the no-spouse rule" (*id.* at 25a). The court of appeals noted that "the proper standard * * * is not whether [a business practice with a discriminatory result] is justified by routine business considerations * * *" (*ibid.*, quoting *Kirby* v. *Colony Furniture Co.*, 613 F.2d 696, 705 n.6 (8th Cir. 1980), as the district court had reasoned (see Pet. App. 29d), but whether the practice has " 'a manifest relation to the employment in question' " (Pet. App. 25a, quoting *Dothard* v. *Rawlinson*, 433 U.S. 321,

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[3]The district court referred the case to a special master for relief proceedings. The master held an evidentiary hearing and recommended, *inter alia*, that the court award $1,015,901 in back pay and certain affirmative relief (Pet. App. 1c-40c). The district court largely adopted the master's findings (*id.* at 1b-11b).

329 (1977)). Moreover, in applying this legal standard to the district court's factual findings, the court of appeals found that petitioner had failed to show that the no-spouse rule contributed to the safety and efficiency of its operations (Pet. App. 25a-29a). Accordingly, the court of appeals concluded that petitioner had "failed to demonstrate that the no-spouse rule was justified by business necessity" (*id.* at 28a-29a).

ARGUMENT

Petitioner contends that the court of appeals erred in concluding that it violated Title VII by employing subjective hiring procedures with an adverse impact on female applicants and by maintaining a policy of not hiring spouses of existing employees. However, the court of appeals correctly decided all issues presented to it and, for that reason, the case presents no issue warranting review by this Court.

1. Petitioner first contends that this Court should grant a writ of certiorari to resolve a conflict in the federal circuits concerning whether a Title VII plaintiff may challenge subjective employment practices for their alleged disparate impact. See Pet. 7-16. As noted in the petition for certiorari filed today in *Tisch* v. *Shidaker*, No. 86- , the courts of appeals are in fact hopelessly divided over the applicability of disparate impact theory to subjective selection devices. However, this case does not raise that issue in a way justifying a grant of certiorari.

The petition for certiorari in this case raises for the first time in this litigation the question whether a Title VII plaintiff can challenge subjective employment practices for their alleged disparate impact. Nothing in the district court's opinion suggests, and petitioner does not now allege, that the applicability of disparate impact analysis to subjective decisionmaking processes was ever challenged in the district court. More importantly, in the court of

appeals, petitioner contended only that its subjective hiring practices were justified by business necessity; it did not argue that the district court had erred in finding that a prima facie case of disparate impact had been established. See Pet. App. 15a-18a; Appellant's Brief For The Rath Packing Company, Nos. 84-1217-SI, 84-1458-SI, at 22-25 (8th Cir. filed May 30, 1984); Reply Brief And Cross Appellee's Brief For The Rath Packing Company, Nos. 84-1217-SI, 84-1458-SI, at 18-19 (8th Cir. filed Aug. 1, 1984). Accordingly, neither the district court nor the court of appeals had an opportunity to address the argument that petitioner now raises; judicial prudence counsels against allowing petitioner to raise that issue for the first time in this Court. See *Illinois* v. *Gates*, 462 U.S. 213, 217-224 (1983) (discussing various prudential reasons for not considering issues presented for the first time in this Court); *Youakim* v. *Miller*, 425 U.S. 544, 551-552 n. 5 (1976) (same); *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975) (same); *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970) (same).

In any event, even if petitioner had raised that issue in the courts below, certiorari would still not be justified because the Commission's evidence proved discrimination under both disparate impact and disparate treatment theories. The district court noted that both "the discriminatory treatment and impact theories * * * may be applied to the specific facts of this cause" (Pet. App. 6d) and held that there had been several instances of intentional discrimination (*id.* at 31d). While the court's analysis of the Commission's statistics led it to find disparate impact and to reach no further express holding concerning disparate treatment, the court did expressly determine that the Commission's statistics satisfied the thresholds of sufficiency that this Court has established for disparate treatment cases (see *id.* at 6d-12d) (citing *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977); *Teamsters* v. *United States*,

431 U.S. 324 (1977)). For these reasons, the court of appeals quite reasonably concluded that "intentional discrimination against women resulted in [petitioner's] employees being overwhelmingly male" (Pet. App. 29a).[4] In short, this litigation did not turn on the particular theory of employment discrimination under which the courts below analyzed the statistical data.[5]

By contrast, in *Tisch* v. *Shidaker*, No. 86- , the Court of Appeals for the Seventh Circuit found that a prima facie case of discrimination had been made out under the disparate impact theory, while upholding the district court's finding for defendant under the disparate treatment theory. Thus, in contrast to this case, the *Shidaker* litigation turns on the particular theory of employment discrimination applied by the courts. Accordingly, it is the more suitable vehicle for resolving the question that currently divides the courts of appeals. Because the petition for certiorari in this case raises that question for the first time on facts where its resolution is unlikely to make a difference in the outcome of the litigation, it should be denied.[6]

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[4]Petitioner argues that, in finding petitioner to have intentionally discriminated against women, the court of appeals was referring only to three instances of individual disparate treatment. See Pet. 18 n.6. But the court of appeals concluded that the "intentional discrimination resulted in [petitioner's] employees being overwhelmingly male" (Pet. App. 28a-29a). This conclusion obviously did not refer only to discrimination against three applicants to a work force of 250 employees.

[5]We recognize that the burden of proving intentional discrimination under a disparate treatment case is conceptually quite different from the burden of proving disparate impact, and may possibly require a different quantum of statistical proof. We note here only that the district court's own reasoning indicated strongly that both burdens were carried.

[6]Alternatively, the Court may wish to hold this case pending the certiorari decision, briefing, and resolution of *Shidaker*.

2. Petitioner also contends that this Court should grant certiorari to resolve whether the court of appeals erred in holding that petitioner failed to establish that its policy against hiring spouses of existing employees was not justified by business necessity (Pet. 19-23). Petitioner suggests that the court of appeals applied an unduly restrictive standard of business necessity and that that standard "conflicts with the more reasonable standard applied by the Seventh Circuit" in *Yuhas* v. *Libbey-Owens-Ford Co.*, 562 F.2d 496 (7th Cir. 1977), cert. denied, 435 U.S. 934 (1978). But petitioner's criticisms are misdirected in this case and, accordingly, this Court's review is unwarranted.

Although certain language in the court of appeals' decision refers to a "compelling need" standard (Pet. App. 25a), the court summarized its holding in terms fully consistent with the reasoning of this Court and the other courts of appeals: "[Petitioner] failed to show that the problems * * * experienced in employing spouses had any demonstrable effect on safety and efficiency" (*id.* at 28a). See *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 587 n.31 (1979); *Dothard* v. *Rawlinson*, 433 U.S. 321, 331-332 & n.14 (1977); *Liberles* v. *Cook County*, 709 F.2d 1122, 1132 (7th Cir. 1983); *Jackson* v. *Seaboard Coast Line R.R.*, 678 F.2d 992, 1016 (11th Cir. 1982); *Zuniga* v. *Kleberg County Hospital*, 692 F.2d 986, 989 (5th Cir. 1982); *Contreras* v. *City of Los Angeles*, 656 F.2d 1267, 1275-1280 (9th Cir. 1981); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870, 879 (6th Cir. 1973); *Robinson* v. *Lorrillard Corp.*, 444 F.2d 791, 798 (4th Cir.), cert. denied, 404 U.S. 1006 (1971). As in *Dothard*, petitioner "failed to offer evidence of any kind in specific justification of * * * [its] standar[d]" (*Dothard* v. *Rawlinson*, 433 U.S. at 331). Thus, petitioner's argument that the court of appeals applied an unduly stringent business necessity standard is without foundation.

Similarly, petitioner's suggestion that the court of appeals' business necessity standard conflicts with the decision in *Yuhas* is erroneous. To be sure, the *Yuhas* court did not require the employer there specifically to show that its "no-spouse" employment rule had positively improved employee morale. See 562 F.2d at 498-500. But the *Yuhas* court expressly noted that its decision would have differed if the plaintiffs there had "shown that [the employer] historically employed more men than women in its * * * plan[t] because it intentionally discriminated against women" (*id.* at 500); in such circumstances, the *Yuhas* court would have been unwilling to presume that a no-spouse rule positively affected the working environment (*ibid.*). In this case, the court of appeals found that petitioner's past "intentional discrimination against women resulted in [its] employees being overwhelmingly male" (Pet. App. 28a). Thus, the court correctly found the *Yuhas* case to be distinguishable (*id.* at 28a-29a). Further review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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